Owners Corporation No 1 – PS434030V v Carroll (Costs) (Owners Corporations) - [2017] VCAT 540

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC671/2014

CATCHWORDS

Costs – nature and complexity of proceeding – unsuccessful application for summary dismissal – respondent repudiating terms of settlement – Calderbank offer – owners corporation rule, requiring respondent to pay costs, is beyond power – *Victorian Civil and Administrative Tribunal Act 1998* , s 109 .

FIRST APPLICANT	Owners Corporation No. 1 - PS434030V
SECOND APPLICANT	Owners Corporation No. 2 - PS434030V
THIRD APPLICANT	Owners Corporation No. 3 - PS434030V
RESPONDENT	Peter John Carroll
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	10 April 2017

DATE OF ORDER 10 April 2017

DATE OF REASONS 20 April 2017

CITATION Owners Corporation No 1 – PS434030V v Carroll (Costs) (Owners Corporations) [2017] VCAT 540

ORDER

1. The respondent must pay the applicants' costs of the proceeding on and from 29 June 2015 to be assessed on the standard basis by the Costs Court unless otherwise agreed.

2. The respondent's application for costs is refused.

A. Vassie
Senior Member

APPEARANCES:

For Applicants Mr A. Beck-Godoy of Counsel

For Respondent Mr P. Duggan of Counsel

REASONS FOR DECISION

1. The respondent Mr Carroll has requested written reasons for my decision on 10 April 2017 to make an order for costs against him and to refuse his own application that the applicants pay his costs of the proceeding from 15 July 2016.

2. On 16 November 2016 I made an order, after a final hearing of the proceeding, that Mr Carroll pay the applicants $13,799.00. My reasons for making that order were published as *Owners Corporation No 1 – PS434030V v Carroll* (Owners Corporations) [2016] VCAT 1863 . I decided that the applicant owners corporations were entitled to compensation of $13,799.00 for the loss and damage they suffered as a result of Mr Carroll's breach of a rule of the owners corporations requiring him to allow them access to a balcony forming part of his lot for the purpose of maintenance of the external walls of the common property at "The Arkley" in Docklands.

3. A year before the proceeding came on for hearing before me on 12 September 2016 there had been a hearing on 1 September 2015 which dealt with Mr Carroll's application for a summary dismissal of the proceeding. On 3 September 2015 the Tribunal refused that application.

4. On 15 July 2016, nearly three months before the hearing of the proceeding, Mr Carroll made an offer to the applicants to settle the proceeding by payment of $20,000.00 inclusive of costs. At the costs hearing on 10 April 2017 Mr Duggan of Counsel for Mr Carroll, in a written submission to which he spoke, described the offer as an offer of compromise given in accordance with s 112 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act"), alternatively as a "Calderbank offer" made in accordance with the principles set out in *Calderbank v Calderbank* [1976] Fam 93 and *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* (2005) 13 VR 435.

5. I saw the written offer of settlement but did not retain a copy of it. Neither party asked me to retain a copy. So I give these reasons without being able to refer to the exact wording of the offer. At the hearing I put to Mr Duggan that it was not an offer of compromise to which s 112 of the Act applied because it did not specify a minimum period of 14 days for which it was open for acceptance, as s 114(1) and (2) of the Act requires. Mr Duggan did not argue to the contrary. I decided that it was not an offer of compromise to which s 112 of the Act applied but was a Calderbank offer.

6. Whether the Tribunal should order either party to pay the other's costs of the proceeding was an issue that had to be decided in accordance with s 109 of the Act .

7. The general rule, set out in s 109(1), is that the parties bear their own costs. By virtue of s 109(s) and (3) the Tribunal may nevertheless order a party to pay all or a specified part of the costs of another party to the proceeding if satisfied that it is fair to do so, having regard to the matters enumerated in s 109(3), including any matter the Tribunal considers relevant. The making and non-acceptance of a Calderbank offer is a relevant matter.

8. As my reasons accompanying the order of 16 November 2016 indicated, the parties had entered into terms of settlement dated 25 August 2014, and so the Tribunal ordered that the proceeding was struck out with a right to apply for reinstatement. The terms included an agreement that the parties should bear their own costs. I decided that Mr Carroll repudiated the terms of settlement. In the course of one of the emails that evidenced the repudiation he said to the applicants' solicitor that "we might as well go straight back to VCAT and beyond." In another, he said, "You might want to try to revive the VCAT proceedings, because I am not in any circumstances going to accept an open-ended deal." Those emails were set out in paragraphs 82 and 85 of my reasons. The applicants made an application to reinstate the proceeding, thereby accepting the repudiation. On 29 June 2015 the Tribunal ordered that the proceeding was reinstated.

9. Of the matters enumerated in s 109(3) the only ones which I considered bore upon whether it was fair to make an order for costs were:

> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

Neither Counsel submitted that any other of the matters enumerated in s 109(3) was significant.

10. The relative strength of the parties' respective claims, and whether a party had made an untenable claim, weighed in favour of a decision that Mr Carroll should pay the costs of his unsuccessful application for summary dismissal of the proceeding. He is a retired lawyer. He, more than most respondents to proceedings at VCAT, ought to have known that an application for summary dismissal can succeed only if it is shown that the proceeding so lacks substance that it is bound to fail or is an abuse of process for other reasons: s 75 of the Act . Not only did the proceeding not fall into that category, but it ultimately succeeded. Mr Carroll's application for an order for summary dismissal was always hopeless: a claim that had no tenable basis, within the meaning of s 109(3)(c) . In all other respects, however, the matter of the relative strengths of the parties' respective claims was a neutral consideration, to my mind. The case was not one in which it was always obvious that the applicants were going to succeed.

11. The nature and complexity of the proceeding weighed in favour of a conclusion that it was fair to make an order for costs in favour of the applicants. Their Points of Claim alleged that their right of access to Mr Carroll's balcony, which he was denying, arose under provisions of the *Owners Corporations Act 2006* , under a rule of the owners corporations and by virtue of an implied easement of way. They raised matters of general importance in the law relating to owners corporations. They gave rise to complexity. Moreover so far as proof of damage was concerned the case resembled a building case in complexity.

12. The parties, however, had entered into terms of settlement by which they agreed to bear their own costs in the proceeding, in conformity with the general rule expressed in s 109(1) of the Act . I took the view for that reason and regardless of any other consideration, that rule should prevail up to the date when, as a consequence of the applicants' acceptance of Mr Carroll's repudiation of the terms of settlement, the proceeding was reinstated on 29 June 2015.

13. There was another relevant matter that weighed in favour of a decision that it was fair to award costs to the applicants for costs incurred after 29 June 2015. It was that as I have stated above, Mr Carroll virtually challenged the applicants to reinstate the proceeding. He took the risks of a successful application for reinstatement, an ultimately successful proceeding, and an order for costs incurred on or after 29 June 2015 against him. For that reason, as well as the nature and complexity of the proceeding, it is fair that there should be an order against him for costs of the proceeding on or after 29 June 2015. For the additional reason referred to in paragraph 10 above, it is fair that he should be made liable to pay the costs of the application for summary dismissal.

14. The Calderbank offer of $20,000.00 inclusive of costs, made on 15 July 2016, was a relevant matter also. If acceptance of that offer in July 2016 would have been a better outcome for the applicants than an award of $13,799.00 plus costs of the proceeding from 29 June 2015 to 15 July 2016, there would be a strong argument that the Tribunal should conclude that it was fair to order the applicants to pay his costs incurred from 15 July 2016; Mr Carroll sought an order accordingly. To decide which was the better outcome, I would have needed to decide whether the applicants' costs between 29 June 2015 and 15 July 2016 were more or less $6201.00.

15. I had no evidence about the quantum of costs. Mr Beck-Godoy showed me some figures which his instructing solicitor had calculated but I had no way of telling whether they were accurate or fair. From my own experience I would expect the costs of the unsuccessful application for summary dismissal, if assessed by the Costs Court, to be less than $6201.00. As to whether the costs of the

proceeding from 29 June 2015 to 15 July 2016 would be assessed at more or less than $6201.00, I could not say. In my view the onus was upon Mr Carroll, relying upon the Calderbank offer, to establish that they were less than $6201.00 and so acceptance of $20,000.00 inclusive of costs would have been a better outcome for the applicants than an award of $13,799.00 plus costs from 29 June 2015 to late July 2016. He did not establish that.

16. In *Metricon Homes Pty Ltd v Sawyer* [2013] VSC 518 Garde J, after noting the advantages to the parties when an offer of settlement is expressed to be inclusive of costs, stated that in an appropriate case VCAT could exercise its power under s 80 of the Act to order the production of bills of costs or its power under s 111(b) of the Act to order that the costs be assessed by the Costs Court up to the date of the offer. As I told the parties at the hearing on 10 April 2017, my term of appointment as a VCAT Senior Member expires on 20 May 2017 and I have taken leave from 24 April 2017 until then. It was therefore not feasible for me to defer a decision pending the kinds of assessment mentioned by Garde J. I had to decide the costs applications then and there. Neither party submitted that the applications for costs should be adjourned so that those assessments could be made and some other VCAT Member could decide the applications.

17. Mr Beck-Godoy made a submission that a rule of the owners corporations, that a member must pay, on demand "all legal costs on a solicitor-own client basis" which they incur or expend as a consequence of any default by the member in observance of the rules, entitled them to an order for costs of the proceeding. I rejected the submission. In my view an owners corporation has no power to make any such rule. It does not come into any of the categories set out in Schedule 1 of the *Owners Corporations Act 2006* of rules which an owners corporation is empowered to make. At all events, I would have accepted the submission of Mr Duggan that the rule would not oust VCAT's discretion as to whether or not to make an order for costs.

18. The applicants asked for an order for costs on an indemnity basis. They put forward no argument, apart from the owners corporation rule, as to why indemnity costs should be ordered. There was nothing about the case that warranted an award of indemnity costs.

19. For those reasons I ordered Mr Carroll to pay the applicants' costs of the proceeding from 29 June 2015 to be assessed by the Costs Court on the standard basis, and dismissed Mr Carroll's application for costs. By virtue of rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2008* , the applicable scale of costs will be the County Court costs scale.

A. Vassie
Senior Member